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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* MANFRED HERRMANN

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Appeal 2009-001777  
Application 10/616,457  
Technology Center 1700

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Decided: November 13, 2009

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Before CATHERINE Q. TIMM, MICHAEL P. COLAIANNI, and  
JEFFREY B. ROBERTSON, *Administrative Patent Judges*.

TIMM, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on an appeal under 35 U.S.C. § 134 from the Examiner's refusal to allow claims 1 through 25, 30 through 33, and 44 through 48. We have jurisdiction pursuant to 35 U.S.C. § 6.

We AFFIRM-IN-PART and enter a new ground of rejection pursuant to 37 C.F.R. § 41.50(b).

## I. STATEMENT OF THE CASE

The subject matter on appeal is directed to a method for the investigation of a fuel cell system. Claim 1 is illustrative:

1. A method for the investigation of a fuel cell system, said fuel cell system having an anode side to which a fuel is supplied in operation and a cathode side to which an oxidizing agent is supplied in operation and comprising at least one fuel cell, each said fuel cell having an anode, a cathode and a membrane separating said cathode from said anode, said method comprising a first test comprising at least one of the following tests:

a) to test whether said fuel cell system is gas-tight at said anode side and/or at said cathode side,

b) to test whether a leakage is present between said anode side and said cathode side,

c) to test a starting behaviour of said fuel cell system, or

d) to test an operation of said fuel cell system at low current yield, said first test being carried out with a mixture of at least one inert gas with a fuel permissible for the operation of said fuel cell system, said mixture being supplied to said anode side of said fuel cell system and the amount of fuel in the mixture being predetermined such that a proportion of said fuel present in said mixture lies below a value at which said mixture is flammable in air, and wherein said tests are conducted outside of a test chamber.

As evidence of unpatentability of the claimed subject matter, the Examiner relies upon the following references:

Tomimatsu	US 5,595,832	Jan. 21, 1997
Meltser	US 5,763,113	Jun. 9, 1998
Knights	US 6,492,043 B1	Dec. 10, 2002
Condit	US 6,635,370 B2	Oct. 21, 2003
Bailey	US 6,638,650 B1	Oct. 28, 2003

The Examiner maintains the following rejections:

- 1) Claims 1-3, 10, 13, 14, and 46-48 under 35 U.S.C. § 102(e) as anticipated by Condit;
- 2) Claims 1, 7, 8, 10, 22-25, and 44-46 under 35 U.S.C. § 102(e) as anticipated by Bailey;
- 3) Claims 4, 5, 11, and 12 under 35 U.S.C. § 103(a) as unpatentable over Bailey and further in view of Knights;
- 4) Claims 6, 7, 9, 18-21, 30-32, and 46 under 35 U.S.C. § 103(a) as unpatentable over Condit or Bailey;
- 5) Claim 15 under 35 U.S.C. § 103(a) as unpatentable over Condit, and further in view of Bailey;
- 6) Claims 16 and 17 under 35 U.S.C. § 103(a) as unpatentable over Condit or Bailey, and further in view of Tomimatsu; and
- 7) Claim 33 under 35 U.S.C. § 103(a) as unpatentable over Condit, and further in view of Meltser.

Appellant appeals with respect to each rejection. We discuss each of the rejections below, grouping claims together where the issues are appropriately discussed together.

## II. DISCUSSION

### *A. Rejection (1): The § 102 rejection of claims 1-3, 10, 13, 14, and 46-48 based on Condit*

With respect to rejection (1), the issue presented for independent claims 1 and 47 is the same. (App. Br. 7-9). Appellant separately argues claim 3 and argues claims 13 and 14 as a group. (App. Br. 5-15). We select

claims 1, 3, and 13 to represent the issues on appeal in accordance with 37 C.F.R. § 41.37(c)(1)(vii). Unargued dependent claims stand or fall with the claim from which they depend.

## 1. CLAIM 1

### a. Issue

Has Appellant shown reversible error in the Examiner's finding that Condit inherently describes conducting a leakage test outside of a test chamber as required by claim 1? We decide this issue in the negative.

### b. Findings of Fact (FF)

1. According to Appellant's Specification and Appeal Brief, because fuel cells contain explosive fuels such as hydrogen, testing is conventionally conducted in a testing chamber (Spec. ¶ [0003]; App. Br. 8).
2. Further according to Appellant's Specification, it was known in the art to substitute helium for hydrogen to avoid the complicated measures (test chambers) needed for explosive gases (Spec. ¶ [0005]).
3. Appellant avoids the safety hazards of hydrogen by using a mixture of inert gas and fuel (hydrogen) including concentrations of the fuel lying below a value at which the mixture is flammable in air (Spec. ¶ [0007]). With such a low-fuel mixture, the fuel cell may be tested without protecting against an explosion, i.e., without confining the fuel cell in a test chamber (Spec. ¶ [0010]). The Specification states that

It is particularly advantageous when the method is carried out with a gas mixture which contains nitrogen

for the inert gas and hydrogen for the fuel, with the mixture containing less than 5.7 vol.-% or mol.-% hydrogen and nitrogen. It is particularly favourable when forming gas having at least substantially 95 % N<sub>2</sub> and 5 % H<sub>2</sub> [is] used as the mixture.

(Spec. ¶ [0013])

4. Condit teaches a "safe, cost effective shut-down procedure[] . . . [for a] fuel cell system," which may be used in automotive applications.

(Condit, col. 1, ll. 36-46).

5. Condit teaches that

for safety, it is preferred to have and to maintain a hydrogen concentration of less than 4%, since more than 4% hydrogen in air is considered in excess of the flammability limit. If there were less than 4% hydrogen, then any air that leaks into or is otherwise introduced into the cell would not be hazardous.

(Condit, col. 3, ll. 11-16).

6. Condit does not explicitly mention that its test is performed outside of a test chamber.

#### c. Principle of Law

In general, a limitation is inherent if it is the "natural result flowing from" the explicit disclosure of the prior art. *Schering Corp. v. Geneva Pharms.*, 339 F.3d 1373, 1379 (Fed. Cir. 2003).

#### d. Analysis

Appellant states that "[s]ilence of the reference as to where the test[s] are conducted can not [sic] support a position of anticipation by inherency . . ." (App. Br. 8). In support of this statement, Appellant asserts that "[t]esting using explosive gases is conducted in test chambers by those

skilled in the art consistent with government regulations addressing the same.” (App. Br. 8).

The law and facts do not support the position of Appellant. Each case must be decided on its own facts and, in the present case, Condit’s silence supports a finding that there is no test chamber required. While there is some evidence to support Appellant’s assertion that “[t]esting using explosive gases is conducted in test chambers by those skilled in the art consistent with government regulations addressing the same” (FF 1), the evidence of record indicates that there is no need for a test chamber to confine the fuel cell of Condit and one of ordinary skill in the art would understand as much. Condit, like Appellant, teaches maintaining a hydrogen concentration of less than 4% in order to ensure that the hydrogen is nonflammable in air. (FF 3-5). The purpose of using a test chamber is to contain explosive or flammable gases (FF 1-2). Therefore, there would be no need for the non-described test chamber in the process of Condit.

Accordingly, we are unpersuaded by Appellant’s arguments that inherency has not been reasonably established by the Examiner or that one of ordinary skill in the art would understand that Condit’s test is conducted in a test chamber.

#### e. Conclusion

Thus, it follows that Appellant has not shown reversible error in the Examiner’s finding that Condit describes conducting a test outside of a test chamber as required by claim 1.

## 2. CLAIM 3

### a. Issue

Has Appellant shown reversible error in the Examiner's finding that Condit describes "[a] method in accordance with claim 1, wherein the mixture comprises substantially 95% N<sub>2</sub> and 5% H<sub>2</sub>" as required by claim 3? We decide this issue in the affirmative.

### b. Additional Findings of Fact (FF)

7. The Examiner argues that Condit teaches a range of "4% to 10% [hydrogen, which] encompasses Appellant's claimed [range of] 'substantially 5% hydrogen.'" (Ans. 15).
8. Condit teaches 10% hydrogen as a practical upper limit with less than 4% being preferred because more than 4% in air is considered in excess of the flammability limit (Condit, col. 3, ll. 6-16).

### c. Additional Principles of Law

Anticipation under 35 U.S.C. § 102 requires that a prior art reference describe each and every limitation of a claimed invention with "sufficient specificity" to establish anticipation. *Atofina v. Great Lakes Chem. Corp.*, 441 F.3d 991, 999-1000, (Fed. Cir. 2006) (holding that (1) a prior art temperature range of 100°C to 500°C does not anticipate a claimed range of 330°C to 450°C and (2) a prior art range of 0.001% to 1% oxygen to methylene chloride molar ratio does not anticipate range of 0.1% to 5.0% oxygen to methylene chloride molar ratio).

"It is to be noted that rejections under 35 U.S.C. § 103 are proper where the subject matter claimed 'is not identically disclosed or described' in 'the prior art,' indicating that rejections under 35 U.S.C. § 102 are proper



only when the claimed subject matter is identically disclosed or described in 'the prior art.'" *In re Arkley*, 455 F.2d 586, 587 (CCPA 1972).

d. Analysis

As a first matter, we note that claim 3 is amenable to two different claim interpretations. Claim 3 requires that "the mixture comprises substantially 95% N<sub>2</sub> and 5% H<sub>2</sub>." Claim 3 can be read as requiring a mixture of substantially 95% N<sub>2</sub>, some other gases, and 5% H<sub>2</sub>. Alternatively, "substantially" can be interpreted as modifying the H<sub>2</sub> concentration as well as the N<sub>2</sub> concentration, i.e., substantially 95% N<sub>2</sub> and substantially 5% H<sub>2</sub>. Under the first interpretation the hydrogen concentration is limited to 5% H<sub>2</sub>. Under the second interpretation some amount of deviation from 5% is encompassed by "substantially." The Specification provides little guidance as to which interpretation is correct. (See FF 3 (reproducing the relevant language from the Spec.)). However, we determine that the Examiner's findings fail to support anticipation for either interpretation.

The Examiner argues that Condit teaches a range of "4% to 10% [hydrogen, which] encompasses Appellant's claimed [range of] 'substantially 5% hydrogen.'" (FF 7). Condit actually teaches a practical upper limit of 10% with a preferred maximum of 4% (FF 8). We cannot say that Condit identifies a 5% hydrogen concentration, or a range of concentration of substantially 5%, with sufficient specificity to constitute a description of the claimed hydrogen concentration. See *Atofina*, 441 F.3d at 999-1000. While Condit may provide a suggestion for using 5% or substantially 5% in

accordance with obviousness, there is no “description” of doing so meeting the requirements of anticipation.

e. Conclusion

Thus, it follows that Appellant has shown reversible error in the Examiner's finding that Condit describes within the meeting of § 102 “[a] method in accordance with claim 1, wherein the mixture comprises substantially 95% N<sub>2</sub> and 5% H<sub>2</sub>” as required by claim 3.

3. CLAIM 13

a. Issue

Has Appellant shown reversible error in the Examiner's finding that the process described by Condit anticipates the process of claim 13? We decide this issue in the affirmative.

b. Additional Finding of Facts (FF)

9. The Examiner finds that Condit teaches

[a] test for measuring the hydrogen concentration present during storage because during storage hydrogen may leak out of the system. The hydrogen concentration within the anode flow field is monitored with a hydrogen sensor and more hydrogen or hydrogen rich fuel is added into the system in order to maintain a desired range of hydrogen.

(Ans. 15-16, *citing* Condit, col. 8, ll. 22-39).

10. Appellant contends that

the Examiner's basis in support of the rejection completely ignores the claim limitation that "a measurement is made of a quantity of said mixture emerging from at least some of

the lines, a sum is formed of the emerging quantities and is compared with fed-in quantities to determine leakage."

(App. Br. 9.)

c. Additional Principle of Law

Under 35 U.S.C. § 102, anticipation is established only when a single prior art reference describes each and every element of a claimed invention. *In re Spada*, 911 F.2d 705, 708 (Fed. Cir. 1990).

d. Analysis

The Examiner does not direct us to any persuasive teaching in Condit that meets the steps of measuring gas mixture quantity emerging from the lines, summing those quantities, and comparing with fed-in quantities, which are the features argued by Appellant (FF 10). The findings of the Examiner are directed to measuring hydrogen concentration only and adding hydrogen to maintain a target hydrogen concentration (FF 9). The Examiner does not provide any credible reason to believe that Condit's process necessarily or inherently possesses the claimed features.

e. Conclusion

Thus, it follows that Appellant has shown reversible error in the Examiner's finding that the process of Condit anticipates the process of claim 13.

*B. Rejection (2): The § 102 rejection of claims 1, 7, 8, 10, 22-25, and 44-46 based on Bailey*

a. Issue

Has Appellant shown reversible error in the Examiner's finding that Bailey describes conducting a test using a mixture of at least one inert gas

and fuel where the proportion of fuel in the mixture is below a value at which the mixture is flammable in air as required by claim 1? We decide this issue in the affirmative.

b. Additional Finding of Fact (FF)

11. Bailey states that "[t]he fuel fluid stream . . . may be a gas such as . . . hydrogen . . . [and] may also contain other fluid components such as, for example, nitrogen, carbon dioxide, carbon monoxide." (Bailey, col. 1, ll. 42-49).

c. Additional Principle of Law

In order to anticipate, a reference must identify something falling within the claimed subject matter with sufficient specificity to constitute a description thereof within the purview of § 102. *In re Schaumann*, 572 F.2d 312, 317 (CCPA 1978).

d. Analysis

The Examiner finds that the teachings of Bailey meet the limitation "a proportion of said fuel present in said mixture lies below a value at which said mixture is flammable in air" recited in claim 1. However, the only citation the Examiner provides in support of this finding is to column 1, lines 43-50 of Bailey. (Ans. 6).

While column 1, lines 43-50 of Bailey discloses using mixtures of hydrogen and various inert gases (FF 11), Bailey does not mention any proportion of hydrogen to inert gas in the mixture, much less one that lies below a value at which the mixture is flammable in air as required by claim 1.

Indeed, as correctly stated by Appellant, Bailey does not disclose "that the amount of fuel in the mixture supplied to the anode should be present in an amount such that the mixture lies below the value at which the mixture is flammable in air . . ." (App. Br. 13). Bailey's disclosure is not sufficiently specific to support a rejection under §102.

e. Conclusion

Thus, it follows that Appellant has shown reversible error in the Examiner's finding that Bailey describes conducting a test using a mixture of at least one inert gas and fuel where the proportion of fuel in the mixture is below a value at which the mixture is flammable in air as required by claim 1.

*C. Rejection (3): The § 103 rejection of claims 4, 5, 11, and 12 based on Bailey and Knights*

With respect to rejection (3), since the Examiner relies on the same findings as discussed in rejection (2) above and does not provide any findings as to how Knights meets the disputed claim feature, the deficiency discussed above has not been overcome.

*D. Rejection (4): The § 103 rejection of claims 6, 7, 9, 18-21, 30-32, and 46 based on Bailey or Condit*

With respect to rejection (4), Appellant separately argues claims 6 and 30-32. (App. Br. 5-15 and Reply Br. 1-9). We select claims 6 and 30-32 to represent the issues on appeal in accordance with 37 C.F.R. § 41.37(c)-(1)(vii). Unargued dependent claims stand or fall with the claim from which

they depend. Our discussion will be confined to Condit, a discussion of Bailey is not required to reach a decision on rejection (4).

## 1. CLAIM 6

### a. Issue

Has Appellant shown reversible error in the Examiner's conclusion that the invention recited in claim 6 would have been obvious over Condit? We decide this issue in the negative.

### b. Additional Finding of Fact (FF)

12. The fuel cells of Condit are appropriate for use in automobile applications, where the system must be shut-down and started frequently. (Condit, col. 1, ll. 36-46; col. 2, ll. 24-44).

### c. Additional Principle of Law

"[T]he claims themselves provide substantial guidance as to the meaning of particular claim terms." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005).

### d. Analysis

We begin by noting that claim 6 requires that at least one of the tests be carried out during *or after* the manufacture of a vehicle incorporating a fuel cell system. Thus, the scope of claim 6 based on its plain meaning requires that the test be carried out either during the manufacture of the vehicle or *at any time after* the manufacture of the vehicle, which encompasses a test occurring at any time during the life of a vehicle such as an automobile.

Appellant argues that "Condit [does not] disclose [that its] . . . tests . . . be carried out *during the manufacture of a vehicle* in order to test operability of the vehicle at time of manufacture." (App. Br. 13) (emphasis added). But claim 6 is not limited to tests carried out during manufacture. Condit discloses testing fuel cells used in automobiles which must be shut-down and started frequently, i.e., during the useful driving life of the automobile (FF 4 and 12). The tests of Condit are carried out after manufacture of a vehicle, but such timing of the tests is encompassed by claim 6.

Thus, because Condit discloses testing fuel cells in vehicles, we find Appellant's argument unpersuasive of reversible error.

Appellant also repeats arguments directed to independent claim 1. (App. Br. 12-14). These arguments are not convincing for the reasons set forth above.

#### e. Conclusion

Thus, it follows that Appellant has not shown reversible error in the Examiner's determination that the invention recited in claim 6 would have been obvious over Condit.

## 2. CLAIMS 30-32

### a. Issue

Has Appellant shown reversible error in the Examiner's determination that the inventions recited in claims 30-32 would have been obvious over Condit? We decide this issue in the negative.

b. Additional Finding of Fact (FF)

13. Appellant does not specifically dispute the Examiner's finding that "Condit . . . show[s] different concentrations of fuel being used, which means that the amount of fuel and inert gas in the mixture is altered."  
(Ans. 19).

c. Additional Principle of Law

Under the flexible inquiry set forth by the Supreme Court, the Examiner must take account of the "inferences and creative steps," or even routine steps, that an ordinary artisan would employ. *Ball Aerosol And Specialty Container, Inc. v. Limited Brands, Inc.*, 555 F.3d 984, 993 (Fed. Cir. 2009).

d. Analysis

Appellant argues that the Examiner's rejection completely ignores the features "a portion of the fuel in said mixture is increased and a second test is carried out in the same manner as the first test" required by claim 30; "said second test is carried out . . . with a significantly reduced portion of inert gas in the mixture" required by claim 31; and "said second test is carried out . . . with a degenerated mixture without inert gas" required by claim 32. (App. Br. 13-14). We disagree.

As correctly stated by the Examiner, "Condit . . . show[s] different concentrations of fuel being used." (FF 13). In other words, Condit discloses as useful a broad range of mixtures, which encompass the mixtures recited in claims 30-32.

Thus, it would have prima facie obvious to follow Condit's first test with a second, routine test using any one of Condit's broad range of



mixtures, including ones required by claims 30-32. *Ball Aerosol*, 555 F.3d at 993.

e. Conclusion

Thus, it follows that Appellant has not shown reversible error in the Examiner's determination that the inventions recited in claims 30-32 would have been obvious over Condit.

*E. Rejection (5): The § 103 rejection of claim 15 based on  
Condit and Bailey*

Appellant provides no additional argument for the rejection of claim 15. Instead, Appellant refers to the arguments made for the rejection of claim 13 in rejection (1). (App. Br. 14). For the reasons discussed above with respect to claim 13, Appellant has not established that the Examiner reversibly erred.

*F. Rejection (6): The § 103 rejection of claims 16 and 17 based on  
Condit or Bailey, and further in view of Tomimatsu*

With respect to rejection (6) based on Bailey and Tomimatsu, since the Examiner relies on the same findings discussed in rejection (2) above and does not provide any findings as to how Tomimatsu meets the disputed claim feature, the deficiency discussed above has not been overcome.

With respect to rejection (6) based on Condit and Tomimatsu, Appellant provides no additional argument for the rejection claims 16 and 17 over and above that presented for claim 1. (App. Br. 15). For the reasons

discussed above with respect to claim 1, the deficiency discussed above has not been overcome.

*G. Rejection (7): The § 103 rejection of claim 33 based on  
Condit and Meltser*

Appellant argues the rejection of claim 33, which is the only claim rejected.

a. Issue

Has Appellant shown reversible error in the Examiner's finding that Meltser does not teach away from Appellant's invention? We decide this issue in the negative.

b. Additional Finding of Fact (FF)

14. Nowhere does Meltser discourage using an amount of hydrogen in the fuel mixture that is below a value at which the mixture is flammable in air.

c. Additional Principle of Law

"A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant." *In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994)

d. Analysis

Appellant argues that Meltser teaches away from the claimed invention because "Meltser et al makes a distinction with respect to the oxidant as being oxygen-rich, but no such distinction is made with respect to

the hydrogen fuel, the inference a person of ordinary skill in the art would draw from the reference is that pure hydrogen is supplied to the anode." (App. Br. 16). We disagree.

Although Meltser teaches an anode flow channel for flowing hydrogen fuel, nowhere does Meltser discourage using an amount of hydrogen in the fuel mixture that is below a value at which the mixture is flammable in air. (FF 12). Appellant provides no persuasive reasoning or evidence to show that "hydrogen fuel" as that term is used in the art must be interpreted to be pure hydrogen. To the contrary, Condit teaches a "hydrogen fuel" having as low as 0.0001% hydrogen, which is known to be below a value at which the mixture is flammable in air (FF 4-5). Accordingly, we find unpersuasive Appellant's arguments that Meltser teaches away from Appellant's claimed invention.

e. Conclusion

Thus, it follows that Appellant has not shown reversible error in the Examiner's finding Meltser does not teach away from Appellant's invention.

### III. NEW GROUND OF REJECTION

We exercise our authority pursuant to 37 C.F.R. § 41.50(b) (2009) to enter a new ground of rejection against claim 3 under 35 U.S.C. § 112, second paragraph.

Claim 3 states that the "mixture comprises substantially 95% N<sub>2</sub> and 5% H<sub>2</sub>." This language is amenable to two plausible claim constructions: (1) the term "substantially" could be interpreted to modify both the individual amount of N<sub>2</sub> and the individual amount of H<sub>2</sub> and (2) the term

"substantially" could be interpreted to modify the aggregate amount of the gas containing 95% N<sub>2</sub> and 5% H<sub>2</sub> such that the claim includes an additional, unrecited gas, such as He, but hydrogen is limited to a 5% concentration.

In this regard, the Specification does not clarify this confusion of whether the term "substantially" modifies the individual amounts of N<sub>2</sub> and H<sub>2</sub> or the aggregate amount of the N<sub>2</sub> and H<sub>2</sub> gas since it states that the gas mixture may contain helium as the inert gas on the one hand and states that the gas mixture may contain "less than 5.7 vol. % or mol% hydrogen" on the other hand. (Spec. ¶¶ [0011]-[0013]).

Accordingly, we determine that the metes and bounds of claim 3 are not clearly set forth as required by 35 U.S.C. § 112, second paragraph. *See Ex parte Miyazaki*, 89 USPQ2d 1207, 1211 (BPAI 2008) (precedential) (holding that "if a claim is amenable to two or more plausible claim constructions, the USPTO is justified in requiring the applicant to more precisely define the metes and bounds of the claimed invention by holding the claim unpatentable under 35 U.S.C. § 112, second paragraph, as indefinite.").

#### IV. ORDER

In summary:

1. The § 102(e) rejection of claims 1, 2, 10, and 46-48 over Condit is affirmed;
2. The § 102(e) rejection of claims 3, 13, and 14 over Condit is reversed;

3. The § 102(e) rejection of claims 1, 7, 8, 10, 22-25, and 44-46 over Bailey is reversed;

4. The § 103(a) rejection of claims 4, 5, 11, and 12 over Bailey, and further in view of Knights is reversed;

5. The § 103(a) rejection of claims 6, 7, 9, 18-21, 30-32, and 46 over Condit or Bailey is affirmed;

6. The § 103(a) rejection of claim 15 over Condit, and further in view of Bailey is reversed;

7. The § 103(a) rejection of claims 16 and 17 over Condit, and further in view of Tomimatsu is affirmed;

8. The § 103(a) rejection of claims 16 and 17 over Bailey, and further in view of Tomimatsu is reversed;

9. The § 103(a) rejection of claim 33 over Condit, and further in view of Meltser is affirmed; and

10. A new ground of rejection has been added pursuant to 37 C.F.R. § 41.50(b) of claim 3 under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Appellant regards as the invention.

#### V. TIME PERIOD

37 C.F.R. § 41.50(b) in part states "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review." 37 C.F.R. § 41.50(b) also provides that Appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of

the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution*. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner . . . .

(2) *Request rehearing*. Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

AFFIRMED-IN-PART

and

NEW GROUND OF REJECTION pursuant to 37 C.F.R. § 41.50(b)

cam

CARY W. BROOKS  
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